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Supreme Court, U.S.
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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1122

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Petitioners,

v.

FLORIDA PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Petitioners,

v.

FLORIDA PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. That Court's original opinion was entered on October 26, 1972, and a Petition for Rehearing was denied on November 15, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 468 F.2d 824 and is printed in Appendix A, *infra*, pp. 1a-5a. The opinion of the District Court is reported at 340 F. Supp. 993 (M.D. Fla. 1972) and is printed in Appendix A, *infra*, p. 6a. The order denying the Petition for Rehearing is printed in Appendix A, *infra*, p. 11a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 26, 1972. A timely Petition for Rehearing was denied and entered on November 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c).

QUESTION PRESENTED FOR REVIEW

Whether the federal courts should interpret a collective bargaining agreement to determine the proper composition of a Board of Arbitration where the parties agree that a dispute is arbitrable but disagree as to how the arbitration tribunal is to be formed.

STATUTES INVOLVED

1. Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 153, 29 U.S.C. §173(d):

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

2. Section 185(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185(a):

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

Petitioner (hereinafter referred to as union) is a labor organization within the meaning of Section 152(2) of the Labor Management Relations Act, 1947, 61 Stat. 137, 29 U.S.C. §152(2) (hereinafter referred to as the Act). Respondent (hereinafter referred to as publisher) is an employer within the meaning of Section 152(5) of the Act. The union instituted an action under Section 301 of the Act seeking to compel the publisher to submit a dispute over wages and other terms of a new contract to arbitration before an arbitration board consisting of two members who were to be appointed by the union, two members who were to be appointed by the publisher, and a fifth disinterested arbitrator to be agreed upon by the parties.

The Court below correctly and succinctly stated the case as follows:

> The core of the dispute between the parties was the meaning of the collective bargaining agreement as it respects the composition of the board of arbitration to be used in resolving open questions in a new agreement between the parties. The company position was that the Joint Standing Committee of §16 of the Agreement is the board of arbitration

contemplated by the parties. This committee is to consist of two members appointed by the company and two by the union. The union contends that there was an oral agreement to embrace a former practice of selecting and using a fifth disinterested person on the arbitration board. The use of such a fifth member was the precise relief sought by the union in the district court.

> *Jacksonville Newspaper Printing Pressmen v. Florida Publishing Co.* 468 F.2d 824, 825 (5th Cir. 1972)

The provisions of the written collective bargaining agreement[1] upon which the lower court ruled provide as follows:

SECTION I

* * *

(2) It is further agreed that all disputes regarding a new contract and scale to become effective at the expiration of this contract, which cannot be settled by conciliation, shall be determined by arbitration as hereinafter provided, and this contract shall remain in force until all disputes are settled by conciliation or arbitration, provided that the arbitration board is formed within thirty (30) days from the date of the request of either party to this contract that said arbitration board be formed in accordance with the provisions of this contract. In the event the arbitration board is not formed within the said thirty-day period, then the duty of either

[1] A copy of the current collective bargaining agreement was attached to the original complaint and was reprinted in the Appendix in the court below at pages 8-26. Petitioner has requested that this Appendix be certified pursuant to Rule 21 of the U.S. Supreme Court.

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party to this contract to arbitrate any unresolved issue is waived, and the rights and liabilities of either party hereunder shall terminate in the same way and manner as if notice of termination had been filed in accordance with paragraph one of this section.

SECTION 16

JOINT STANDING COMMITTEE

(1) Should any question or difference arise between the parties to this agreement, said question or differences shall immediately be referred in writing to the Joint Standing Committee.

(2) A Joint Standing Committee shall be maintained, to consist of two representatives of the Publisher, and two representatives of the Union, and in the case of a vacancy, prolonged absence, or refusal of a representative to act, another shall be immediately appointed in his place. To this committee shall be referred all questions which may arise as to the connstruction to be placed upon any of the clauses of this Agreement or any alleged violations thereof, which cannot be settled otherwise. Such Joint Standing Committee shall meet within fifteen (15) days after any question or differences shall have been referred to it for decision by the authorized representatives of either party to this Agreement.

In the proceedings below, the federal court concluded that since the arbitration board had not been formed within thirty (30) days as set forth in Section I(2), the publisher was under no duty to arbitrate and granted the publisher's motion to dismiss. The Fifth Circuit held that this was an erroneous approach to the question of dismissal, declaring that the thirty day issue was a procedural one and, as such, it must be decided by

arbitration, and not by the court. The union agrees with this conclusion and so argued in its brief to the Fifth Circuit.

However, the Fifth Circuit affirmed the dismissal holding that the issue over the composition of the arbitration board, as well as the thirty day issue, was for the Joint Standing Committee under Section 16 of the written collective bargaining agreement, and not for the court.

REASON FOR GRANTING THE WRIT

I.

A NOVEL QUESTION OF NATIONAL SCOPE CONCERNING THE PROPER ROLE OF THE JUDICIARY IN LABOR ARBITRATION CASES IS PRESENTED.

The starting point for the union's argument is Section 203(d) of the Act which states:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining statement. . . .

The above quoted statute appears to be the primary statutory basis for this Court's landmark pronouncements in the so-called *Steelworkers' Trilogy*. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593. But, the *Trilogy* and its progeny dealt with arbitration problems which did not answer the threshold question here. Both parties agree that the underlying contractual dispute is subject to arbitration, but differ as to what is the "method agreed upon by the

parties" to resolve that dispute within the meaning of Section 203(d). The union submits that this determination is properly one for the court to decide. The Fifth Circuit's decision to defer this determination to the Joint Standing Committee is erroneous for several reasons. First, the issue here is not merely a procedural one, but rather a substantive one which goes to the heart of the agreement to arbitrate. Second, by entrusting the determination of this issue to the Joint Standing Committee, the Fifth Circuit, under the guise of deference, has upheld the publisher's contention that the Joint Standing Committee is the Board of Arbitration without affording the union the opportunity to present its evidence meaningfully in a forum capable of rendering a decision on the basic issue—the proper composition of the Board.

Moreover, for the union to present this evidence to an equally divided Joint Standing Committee would be an exercise in futility. It is expected that the partisan committee members will champion the positions of their appointers. See *In re Duluth, Missabe & Iron Range Ry.*, 124 F.Supp 923 (D. Minn. 1954).

What is of equal consequence is that by deferring to a forum which is inherently incapable of reaching a decision on such an important issue, the decision of the Court of Appeals arguably places the union in the ridiculous position of not being able to use its ultimate economic weapon—a strike. This is so because of the language of Section 15 of the collective bargaining agreement which states:

SECTION 15

> In the event of a difference arising between the parties to this contract, all work shall continue without interruption pending proceedings looking to conciliation or arbitration, as provided in Sections 1 and 16. The scale and hours provided herein between the parties and the working conditions prevailing at the time the difference arises, shall be preserved unchanged until a final decision of the matter at issue shall have been reached (which decision shall be retroactive to the date the difference arose).

This section provides the publisher with a no-strike clause precluding work stoppages "*until a final decision of the matter at issue shall have been reached . . .*" (Emphasis added.) It refers back to Section 1 which provides that "*this contract shall remain in force until all disputes are settled* by conciliation or *arbitration . . .*" (Emphasis added.) It is clear, therefore, that even the written provisions of the collective bargaining agreement envisage a method of *settling* disputes. Until a "final decision" is reached, it would be expected that the publisher would insist that the no-strike provisions of Section 15 operate to prevent any work stoppages by the union. It simply is inconceivable that the union would give up its right to strike without the "quid pro quo" of an arbitration procedure which is capable of making a final determination of disputes.

The contract, in six places, mentions "arbitration" as the means of settling disputes. The only thing missing from the contract is a procedure for selecting the impartial arbitrator. Although the Joint Standing Committee procedure in Section 16 clearly is not "arbitration", the contract specifies "arbitration". It is patent

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therefore that there is a glaring ambiguity in the contract leaving unanswered the question of how did the parties intend that "arbitration" should take place and how did they intend that the arbitrator be selected. It is the contention of the union that an agreement between the parties on these issues was made contemporaneously with the written agreement; and the union is prepared to offer evidence to prove that agreement. The Fifth Circuit's decision deprives the union of the right to prove the entire agreement by parol evidence; and this decision should not be permitted to stand when it is based upon a construction of a patently ambiguous and incomplete document which on its face begs explanation by parol evidence of the contemporaneous intent of the parties. This parol evidence will show mutual agreement upon impartial arbitration as the means of settling disputes.

It is clear that parol evidence of contemporaneous agreements and evidence of bargaining history are legitimate sources of inquiry in the construction of collective bargaining agreements. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567; *Watson v. International Bhd. of Teamsters*, 399 F.2d 875, 879 (5th Cir. 1968); *Local 787, IUE v. Collins Radio Co.*, 317 F.2d 214, 218 (5th Cir. 1963); and *Communications Workers v. Pacific Northwest Bell Telephone Co.*, 337 F.2d 455, 459 (9th Cir. 1964). See also Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1402, 1500 (1959); and _____, *Notes, Admissibility of Parol Evidence in Judicial Determination of Arbitrability*, 63 Mich. L. Rev. 1274 (1965).

It is, of course, toward the goal of *settling* disputes by an agreed upon peaceful method that our federal labor policy is directed. The lower court's order simply does not leave the parties with a method of settling either the

issues now entrusted to the Joint Standing Committee or the underlying issues regarding new contract terms.

In *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, the Supreme Court implied a no-strike agreement concerning disputes which were covered by final and compulsory arbitration. While the union contends that the parties have in fact agreed upon an arbitration board with a fifth member and capable of resolving disputes, a corollary to the rationale of *Lucas Flour* would be to infer such an agreement from the existence of a no-strike clause, the traditional "quid pro quo" for final and binding arbitration.

In view of the clear national policy of resolving labor disputes by peaceful means, it is incumbent upon the federal judiciary to give meaning and effect to the arbitration process. It is equally clear that the inherent equitable powers of the federal courts can and should be used to fashion appropriate legal and equitable remedies. As pointed out by the U.S. Supreme Court in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457.

> . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. *The range of judicial inventiveness will be determined by the nature of the problem.*
>
> [Emphasis added.]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2367
Summary Calendar*

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Plaintiff-Appellant,

versus

FLORIDA PUBLISHING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(October 26, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

BELL, Circuit Judge: Appellant union brought suit against the publishing company under 29 USCA, §185 (§301 of the Labor-Management Relations Act of 1947),

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

in an effort to compel arbitration before a board including a disinterested arbitrator rather than before a board consisting of four members, two of whom were to be appointed by each of the parties under a collective bargaining agreement. The dispute resolved itself into a question of construction of the collective bargaining agreement and whether there was, as alleged, a parol agreement between the parties modifying the form of the board of arbitration. The district court dimissed the suit on the basis of the court's construction of the contract. *Jacksonville Newspaper Printing Pressmen and Assistant's Union No. 57 v. Florida Publishing Company*, M.D. Fla., 1972, 340 F. Supp. 993. We agree with the result of dismissal but disagree with the reason for dismissal. Since the complaint was due to be dismissed, we affirm.

The core of the dispute between the parties was the meaning of the collective bargaining agreement as it respects the composition of the board of arbitration to be used in resolving open questions in a new agreement between the parties. The company position was that the Joint Standing Committee of §16 of the Agreement is the board of arbitration contemplated by the parties. This committee is to consist of two members appointed by the company and two by the union. The union contends that there was an oral agreement to embarce a former practice of selecting and using a fifth disinterested person on the arbitration board. The use of such a fifth member was the precise relief sought by the union in the district court.

The company stood ready to proceed on the four member basis and moved for summary judgment to this end. This motion was not considered because of the view of the district court that the matter was controlled by another provision of the agreement to the effect that the

questions in issue need not be arbitrated if the arbitration board was not formed within thirty days from the date of the request for arbitration.[1] The board not having been formed in the requisite thirty day period, dismissal followed. We conclude that this was an erroneous approach to the question of dimissal.

Section 16 of the agreement sets out the procedural law of the shop as it was chosen by the parties here. It is the only provision of the agreement addressed to any form of an arbitration board. It provides:

SECTION 16.

JOINT STANDING COMMITTEE

(1) Should any question or difference arise between the parties to this Agreement, said question or differences shall immediately be referred in writing to the Joint Standing Committee.

SECTION 1.

* * *

[1] (2) It is further agreed that all disputes regarding a new contract and scale to become effective at the expiration of this contract, which cannot be settled by conciliation, shall be determined by arbitration as hereinafter provided, and this contract shall remain in force until all disputes are settled by conciliation or arbitration, provided that the arbitration board is formed within thirty (30) days from the date of the request of either party to this contract that said arbitration board be formed in accordance with the provisions of this contract. In the event the arbitration board is not formed within the said thirty-day period, then the duty of either party to this contract to arbitrate any unresolved issue is waived, and the rights and liabilities of either party hereunder shall terminate in the same way and manner as if notice of termination had been filed in accordance with paragraph one of this section.

(2) A Joint Standing Committee shall be maintained, to consist of two representatives of the Publisher, and two representatives of the Union, and in the case of a vacancy, prolonged absence, or refusal of a representative to act, another shall be immediately appointed in his place. To this committee shall be referred all questions which may arise as to the construction to be placed upon any of the clauses of this Agreement or any alleged violations thereof, which cannot be settled otherwise. Such Joint Standing Committee shall meet within fifteen (15) days after any question or differences shall have been referred to it for decision by the authorized representatives of either party to this Agreement.

It thus appears that the question determined by the district court was saved by agreement of the parties for the Joint Standing Committee. And this is also the reason why appellant union was entitled to no relief. In *Local Union No. 787, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. Collins Radio Company*, 5 Cir., 1963, 317 F.2d 2114, we said: "That which the parties have committed to the arbiter is for the arbiter alone—not the Court". 317 F.2d at 220. This is the rationale of *International Union of Operating Engineers Local 150, AFL-CIO v. Flair Builders, Inc.*, 1972, ____ U.S. ____, 92 S.Ct. ____, 32 L.Ed. 2d 248. The only questions for the court are whether the parties have agreed to arbitration, and the scope of the arbitration clause. Here the parties have so agreed and the scope of the arbitration clause embraces the questions presented.

The question involving the bar of the failure to form the arbitration board in thirty days (Agreemenent, Section I(2)), and whether there was a modification of

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the agreement so as to provide a disinterested person as a fifth arbitrator are for the Joint Standing Committee under the agreement and not for the court.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57, Plaintiff,	:	
v.	:	No. 71-274-Civ-J
FLORIDA PUBLISHING COMPANY, Defendant.	:	

ORDER

This is an action for breach of an employment contract arising under the Labor-Management Relations Act of 1947, Section 301, 29 United States Code, Section 135. The plaintiff prays the Court, with respect to a current contract dispute: to declare that the current collective bargaining agreement between the parties provides for compelling and binding arbitration by an impartial arbitrator; to order the defendant to participate in the choosing of an impartial arbitrator; and to order the defendant to submit to arbitration.

The case now comes before the Court on defendant's motions for dismissal and summary judgment (filed September 9, 1971) directed at plaintiff's twice-amended complaint. For the reasons set out below, the motion to dismiss is granted.

On August 8, 1968, the parties to this action executed a written employment agreement to be effective from May 1, 1968, to May 1, 1970. This written contract is

incorporated into plaintiff's complaint by specific reference. The present controversy centers around Section #1(2) of the written contract:

> 1(2). It is further agreed that all disputes regarding a new contract and scale to become effective at the expiration of this contract, which cannot be settled by conciliation, shall be determined by arbitration as hereinafter provided, and this contract shall remain in force until all disputes are settled by conciliation or arbitration, provided that the arbitration board is formed within thirty (30) days from the date of the request of either party to this contract that said arbitration board be formed in accordance with the provisions of this contract. In the event the arbitration board is not formed within the said thirty-day period, then the duty of either party to this contract to arbitrate any unresolved issue is waived, and the rights and liabilities of either party hereunder shall terminate in the same way and manner as if notice of termination had been filed in accordance with paragraph one of this section.

The basis of the plaintiff's claim is as follows: The provision for arbitration, referred to in Section #1(2) above, was not made elsewhere in the written contract. Instead, an oral agreement, wherein the procedure for arbitration was set out, was made by the parties contemporaneous to the execution of the written contract. The oral contract provided that should the arbitration anticipated by Section #1(2) of the written contract become necessary, an arbitration board consisting of five members would be formed: each party individually selecting two members, and the parties jointly selecting the fifth, impartial member. The parties have engaged in

negotiations for a new contract for many months beyond the May 1, 1970, expiration date of the 1968 contract.[1] On January 11, 1971, after a new agreement had not been reached, plaintiff delivered a written demand to defendant for arbitration. The defendant, however, has refused to join the plaintiff in the selection of the fifth, impartial member of the arbitration board. Plaintiff contends that defendant's refusal constitutes breach of contract.

The defendant contends that Section #16(2)[2] of the written contract provides the procedure for forming the

---

[1]Pursuant to Section #15 of the 1968 written agreement, work by plaintiff's members at defendant's plant has continued beyond May 1, 1970, while negotiations for a new contract have been in progress.

[2]Section #16 provides:

JOINT STANDING COMMITTEE

(1) Should any question or difference arise between the parties to this Agreement, said question or differences shall immediately be referred in writing to the Joint Standing Committee.

(2) A Joint Standing Committee shall be maintained, to consist of two representatives of the Publisher, and two representatives of the Union, and in the case of a vacancy, prolonged absence, or refusal of a representative to act, another shall be immediately appointed in his place. To this committee shall be referred all questions which may arise as to the construction to be placed upon any of the clauses of this Agreement or any alleged violations thereof, which cannot be settled otherwise. Such Joint Standing Committee shall meet within fifteen (15) days after any question or differences shall have been referred to it for decision by the authorized representatives of either party to this Agreement.

Defendant agrues that the Joint Standing Committee is the same entity as the Arbitration Board referred to in Section #1 and various other sections of the written contract.

arbitration board, to-wit: each party is to choose two members of a four-member arbitration board. Since this contract section, which is incorporated into plaintiff's complaint, affirmatively shows that the defendant has no duty to help choose a fifth board member, defendant moves to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted.

The defendant moves for summary judgment on the same grounds. It has submitted sworn affidavits of various persons bearing on the intention of the parties at the time of execution of the written contract in an effort to show that it is factually beyond question that Section #16(2) provides for the formation of the arbitration board.

The Court grants defendant's motion to dismiss. In so doing, the Court finds it unnecessary to determine whether Section #16(2) of the written contract serves the function urged by the defendant, or whether the oral agreement alleged by the plaintiff was ever made.

Although a motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted, dismissal is justified when it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim.[3] It follows that where plaintiff's cause of action arises out of a contract which is attached to his complaint as an exhibit, and where such contract shows unambiguously on its face that the relief prayed for is not merited, then dismissal is appropriate.[4]

---

[3]*See, e.g. Cook & Nichol, Inc. v. The Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971) and cases cited herein.

[4]*Case v. State Farm Mutual Ins. Co.*, 294 F.2d 676 (5th Cir. 1961).

In the case at bar, the plaintiff has incorporated into its complaint the 1968 written contract. Section #1(2) of that contract, in pertinent part, provides:

> In the event the arbitration board is not formed within the . . . thirty-day period [after the request by one party that an arbitration board be formed], the duty of either party to arbitrate any unresolved issue is waived. . . .

In the light of this quoted passage, the Court finds that no relief can be granted under any construction of the contract urged by the plaintiff. Since more than thirty days have passed from the date plaintiff requested defendant to arbitrate, and since plaintiff alleges that no arbitration board has yet been formed, then, on the face of the complaint, defendant has no duty to arbitrate. It follows that the relief prayed for by the plaintiff cannot be granted.

It is therefore

ORDERED:

1. Defendant's motion to dismiss is granted and this case is dismissed with prejudice.

2. Defendant's motion for summary judgment is moot.

DONE and ORDERED at Jacksonville, Florida, this 21st day of April, 1972.

/s/
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2367
Summary Calendar

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Plaintiff-Appellant,

v.

FLORIDA PUBLISHING COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(November 15, 1972)
ON PETITION FOR REHEARING

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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Supreme Court, U. S.
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MAR 5 1973
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1122

JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Petitioner,

v.

FLORIDA PUBLISHING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March, 1973.

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JACKSONVILLE NEWSPAPER PRINTING PRESSMEN AND ASSISTANTS' UNION NO. 57,

Petitioner,

v.

FLORIDA PUBLISHING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

Petitioner, on February 13, 1973, filed a Petition for a Writ of Certiorari to review a decision and judgment of the United States Court of Appeals for the Fifth Circuit, reported at 468 F.2d. 824. (Opinion dated October 26, 1972 – rehearing denied November 15, 1972.) Petition was received by Respondent on February 15, 1973. The Court of Appeals had affirmed a decision of the United States District Court for the Middle District of Florida, reported at 340 F.Supp. 993.

Respondent files this brief in opposition to the granting of the writ. It is necessary to restate the Question Presented, in accordance with Supreme Court Rule 40(d)(2).

QUESTION PRESENTED FOR REVIEW

When the parties for 17 years have had a written contract expressly providing for a four-man board of arbitration on all questions or differences (which board is set up and available) the courts may not interfere to rewrite the contract and provide for a different kind of arbitration.

There is no question here of such a nature as to justify certiorari to override the final appellate decision of the Court of Appeals. There is no conflict or departure from settled principles of law and decisions of the courts. (Supreme Court Rule 19.)

The Fifth Circuit's decision to defer to arbitration a dispute expressly embraced within the scope of the grievance-arbitration clause of the collective bargaining contract is in accord with long established national labor policy, and the repeated holdings of this Court.

STATEMENT OF THE CASE

Petitioner (sometimes hereinafter referred to as the Union or plaintiff) since 1941 has had labor contracts with the Respondent (sometimes hereinafter referred to as Publishing Company or defendant). Over the intervening 32 years, their relations have been pleasant and cordial and there have been no difficulties in adjusting any differences.

From 1941 to 1956, the parties had written contracts call-

ing for a fifth or outside arbitrator – the very thing the Union now wants put back into the contract. (T. Appendix 88, 89)[1]. But, some 17 years ago, this provision for an outside arbitrator was taken out of the contract by mutual agreement. The record does not disclose that it had ever been used or that an outside arbitrator was ever necessary. Subsequent to 1956, the Union negotiated to get it back in the contract, but this outside arbitrator provision was never restored. [See affidavits of all negotiators – in particular, Smith (T. Appendix 130) and Reid (T. Appendix 89)]. The present contract calls for arbitration before a four-man board (Joint Standing Committee – Petition, p. 5).

Section 16 of the parties' contract expressly provides that – 'to this committee (Bipartite Joint Standing Committee) shall be referred *all questions* which may arise *as to the construction to be placed upon any of the clauses of this Agreement or any alleged violations thereof*, which cannot be settled otherwise.' (T. Appendix 22-23, Petition p. 5)

Alleging that "no arbitration board has yet been formed" (T. Appendix 165), the Union went to court. It asked the *court* to amend the written contract to provide for a fifth arbitrator, to set up such *new* board, and to require arbitration before such new board (T. Appendix 3, 43, 149, 156).

Thus the Union is trying to get the court to rewrite the written contract attached to the complaint. On that point, the facts were so clear the Publishing Company repeatedly sought a summary judgment requiring arbitration before the

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Note 1: We refer to the Transcript or Printed Appendix sent up by the Fifth Circuit as T. Appendix.

four-man board contracted for and already set up by the parties (T. Appendix 83).[2]

The trial court felt it was not necessary to get to that point. After giving the Union every chance to amend, it dismissed the Union's *third* amended complaint on the ground that the Union had not stated any claim for judicial relief (340 Fed. Supp. 993, M.D. Fla. 1972).

The Trial court held that "no relief can be granted under any construction of the contract urged by the plaintiff" (T. Appendix 160-165). The Petition copies the Order at pages 6a to 10a.

Fifth Circuit Opinion

On appeal, the Fifth Circuit affirmed, but on a somewhat different basis. It held (C.A. Fla. 1972, 468 F.2d. 824, pages 4a and 5a of Petition):

> "It thus appears that the question determined by the district court was *saved by agreement of the parties for the Joint Standing Committee.* And this is also the reason why appellant union was entitled to no relief. In *Local Union No. 787, International Union of Electrical Radio and Machine Workers, AFL-CIO v. Collins Radio Company,* 5 Cir., 1963, 317 F.2d. 214, we said: *'That which the parties have committed to the arbiter is for the arbiter alone – not the Court.'* 317 F.2d. at 220. This is the rationale of *International Union of Operating Engineers Local 15, AFL-CIO v. Flair*

Note 2: As shown in our motions and renewed motions for summary judgment, on the undisputed facts the Publishing Company was entitled to judgment. (T. Appendix 33, et seq.; 83, et seq.; 151, et seq.; 158, et seq.).

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Builders, Inc., 1972, ... U.S. ....., 92 S.Ct. ....., 32 L.Ed.2d. 248. *The only questions for the court are whether the parties have agreed to arbitration, and the scope of the arbitration clause. Here the parties have so agreed and the scope of the arbitration clause embraces the questions presented.*

The question involving the bar of the failure to form the arbitration board in thirty days (Agreement, Section I(2)), and whether there was a modification of the agreement so as to provide a disinterested person as a fifth arbitrator are for the Joint Standing Committee under the agreement and not for the court." (Italics here and elsewhere added by us unless otherwise indicated.)

The parties here have had for 17 years a contract which in so many words provides for all disputes to go to a four-man board of arbitrators (Joint Standing Committee – T. Appendix 23 – Petition, pp. 5 and 8a), which is already set up (T. Appendix 136). The Publishing Company now is, and always has been, perfectly willing for all unresolved disputes to go before that board (T. Appendix 84, 130, 136). For 32 years, the parties have been able to peacefully adjust their differences.

Joint Arbitration Boards Not Unusual

As pointed out by witness Reid *and not disputed by any one*, it is not at all unusual to have a four-man joint board (T. Appendix 92).

That a contract providing for an equal number of management and union representatives, without an outside arbitra-

tor, is not unusual or unlawful, is indicated by the following cases, among others:

Roadway Express, Inc., 54 LRRM 1419, 145 NLRB No. 51 (1963). (A Board decision containing comments on bipartite grievance committees.)

Denver-Chicago Trucking Co., 48 LRRM 1524, 132 NLRB No. 123 (1961). (Labor Board recognizes the sufficiency of a grievance procedure utilizing a committee with an equal number of management and union representatives.)

Mechanical Contractors Assn. and Local Union 269 (Case No. 2-CA-12413, June 25, 1972) NLRB-TXD-419-72, BNA Daily Labor Report No. 124-6, June 26, 1972.

IUE v. Radio Corp. of America, 74 LRRM 2883, (S.D. N.Y. 1970). (Contains a good discussion and some citations on Section 203(d) of the National Labor Relations Act (29 USC 173 (d)).

New Teamsters' National Freight Agreement covering over-the-road and local cartage employees, where the national grievance procedure (Article 8, pages 41-45) provides for a bipartite grievance committee (BNA Collective Bargaining Negotiations and Contracts, Section 30:10 (1970)).

The practice of utilizing an arbitration board consisting of equal representation between labor and management is premised upon a number of factors, as shown by the above cases. One of them is the logical assumption that arbitrators *familiar* with the plant operation are in a *better* position to resolve disputes, than is an *outsider* who is a stranger to the dispute and to the history of the plant operation.

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In essence, the Union seeks to have the Court compel the parties not merely to arbitrate (which both sides are willing to do) but rather to arbitrate in a manner specified by the Union. This flies in the face of the express written agreement of the parties.

REASONS FOR NOT GRANTING THE WRIT

Asserted "Novel Question" Not Sufficient

We had not understood that just because a party was dissatisfied with the terms of a formal written contract, or the final appellate decision of a Court of Appeals, that entitled him to certiorari review by this Court. Such a result is diametrically opposed to Supreme Court Rule 19 which specifically limits certiorari.

As stated by Mr. Chief Justice Vinson (Stern and Gressman, Supreme Court Practice, Second Edition, page 107):

> "The Supreme Court is not, and never has been, primarily concerned with the *correction of errors* in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner *has already received one appellate review of his case.* The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise

> supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court."

Or, as Mr. Chief Justice Taft expressed it in *Magnum v. Coty* (1923) 262 U.S. 159, 163:

> "The jurisdiction (of the Supreme Court to review cases by way of certiorari) was not conferred upon this Court merely to give the defeated party in the Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Petitioner (at page 2) says the jurisdiction of this Court is invoked under 28 USC 2101(c). That section merely fixes the *time* (90 days) within which to seek certiorari. It certainly *does not confer jurisdiction.*

In its Question, Petitioner sets up a hypothetical situation which is not applicable here. Here, the parties (as held below), by formal written contract, agreed on the proper composition of the board of arbitration, and that board is set up and available.

In its "Reasons for Granting the Writ" (Petition, p. 6), Petitioner asserts only a "novel question." It does not assert any conflict or unsettled question or departure as contemplated by Rule 19. It merely tries to get review because of a "novel question" (this despite a firm written contract and a final appellate decision).

Just what novel question of national scope is there here to justify certiorari? There is none. This Court has repeatedly held, just as the Fifth Circuit did below, that that which the parties have committed to arbitration is for the arbiter – not the Court.

Section 203(d) of Labor-Management Relations Act

We are in accord with Petitioner's "starting point for the Union's argument" (Petition, p. 2), i.e., Section 203(d) of the Act:

> "Final Adjustment *by a method agreed on by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement *****."

But the Parties Make the Contract and the Method, Not the Courts

It is Hornbook law, as stated at 17 Am.Jur.2d., Contracts, Section 242, pages 627, et seq.:

> "It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does *not* include its *modification* or the creation of a new or different one."

Cf. *Chevron Oil v. N.L.R.B.* (CA-5, 1971) 442 F.2d 1067, 1073, 1074; *Local 464 v. Hershey* (CA-9, 1970) 433 F.2d. 926; *N.L.R.B. v. Gulf Atlantic* (CA-5, 1961) 291 F.2d. 475, 478; *In Re Pacific Neo-Gravure* (1968) 51 L.A. 14, 25; and *U.S. Bulk Carriers v. Arguellas* (1971) 400 U.S. 351, 361.

This Court has repeatedly held that *"arbitration is a matter of contract." United Steelworkers v. Warrior* (1960) 363 U.S. 574, 582; *Atkinson v. Sinclair* (1962) 370 U.S. 238, 241; *Wiley v. Livingston* (1964) 376 U.S. 543, 547.

No one disputes that for many years the parties have agreed (by formal written contracts) on a joint four-man board. They have gotten along well and amicably. Now, the Union has decided to try to get the Court to rewrite its contract for it to provide a different method. Four-man boards are common and rather universally accepted in labor contracts, as set out at page 5. Here, the Union agreed 17 years ago to cut out the fifth outside man. It is a question for the parties, *not* for the courts, as to *rewriting* the contract to reinstate the fifth man.

The Courts May Not Take Over as Arbiter

Finally and perhaps most important, as this Court recently held in *International Union v. Flair* (1972) 406 U.S. 487, 32 L.Ed.2d. 248, and as stated by the court below:

> "That which the parties have committed to the arbiter is for the arbiter alone – not the Court." (Petition, p. 4a, 468 F.2d. 824).

The four-man arbitration board is and has been set up and available to act as arbiter.

For years, many employers and unions have agreed on and used joint arbitration boards – like the four-man board here.

This very Union for 17 years has had such an agreement. This has not suddenly become a "novel question" which justifies a complete departure from settled law, and the repeated decisions of this Court.

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The Union and the Publishing Company have been able since 1941 to get along peaceably, and settle their disputes without bringing in an outside arbitrator. It is unseemly to assert at this late date that the Joint Arbitration Board cannot adjust any differences. There is not a line in the record to support such an assertion. All the past history is to the contrary. The Union here just chose to go to court to try to get the contract rewritten rather than give the Joint Arbitration Board a chance to operate. The Union should present its dispute to the Board.

In essence, the Union seeks to have the Court compel the parties not merely to arbitrate (which both sides are willing to do), but rather to arbitrate as specified by the Union, directly contrary to the express written agreement of the parties. The Union's position flies in the face of a long line of decisions of this Court beginning with *United Steelworkers v. Warrior, supra,* and as late as *International Union v. Flair* (1972) *supra.* In *United Steelworkers v. Warrior, supra,* this Court enunciated the national labor policy favoring deference to arbitration where a dispute arising under the contract is "arguably arbitrable":

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than the strike, is the terminal point of the disagreement. (363 U.S. at 581)
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> . . . .
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> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive as-

> surance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (363 U.S. at 582).

This case involves nothing more than "a dispute over the meaning and application of the collective bargaining Agreement." The parties here have committed all such disputes to the Joint Standing Committee – not to the Courts. See *International Union v. Flair, supra; Wiley v. Livingston, supra,* and *Collyer Insulated Wire* (1971) 192 N.L.R.B. 150.

CONCLUSION

Admittedly, and as found by both courts below, the parties had a formal written contract calling for a four-man arbitration board.

The language of the contract as set up in the Petition on page 5 provides that should "any question or difference arise between the parties ----, it shall immediately be referred in writing" to the joint four-man board. This expressly includes questions of "construction."

The parties have agreed on an arbitration set-up for their differences here involved. There is now set up the board agreed on by the parties for such arbitration.

The decision of the Fifth Circuit below is in accord with long standing national labor policy – that which the parties have committed to the arbitrator is for the arbitrator alone – not the Court. No basis for certiorari jurisdiction has been established. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY I have this 2nd day of March, 1973, mailed copies of the foregoing Brief of Respondent to Patrick M. Scanlon, Esquire, attorney for the Petitioner, at 600 Rhodes-Haverty Building, Atlanta, Georgia 30303.

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